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Nos. 31, 32

In the Supreme Court of the United States

OCTOBER TERM, 1944

JAMES KARL MUSCHANY AND VERA MUSCHANY,
PETITIONERS

v.

UNITED STATES OF AMERICA

WILLIAM L. ANDREWS AND BERTHA L. ANDREWS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

In No. 31 the district court wrote a memorandum opinion (R. 449–460) which is reported in 46 F. Supp. 921. In No. 32 the district court wrote a memorandum opinion (R. 656–657)

which is unreported. The opinion of the circuit court of appeals (R. 690–703) is reported in 139 F. 2d 661.

JURISDICTION

The judgments of the circuit court of appeals sought to be reviewed were entered December 22, 1943 (R. 703–704). Petitions for rehearing were denied January 14, 1944 (R. 723, 739). The petitions for writs of certiorari were filed February 17, 1944, and February 24, 1944, respectively, and were granted April 3, 1944 (R. 743). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether in condemnation proceedings the United States may disaffirm, as contrary to public policy, option contracts for the purchase of land under which five percent of the purchase price was to be paid to the agent of the Government engaged in negotiating for the contracts.

2. Whether the contracts were ratified by the United States.

STATEMENT

These proceedings were brought by the United States to condemn land in St. Charles County, Missouri, as a site for the Weldon Springs ordnance plant. The two cases were joined with a third similar case for trial before the three judges in the district court on the common issue of the

validity of purchase contracts for acquisition of the land. The pertinent facts are the following:

The Act of July 2, 1940, 54 Stat. 712, provided for the more expeditious acquisition of property "out of the moneys appropriated for the War Department for national-defense purposes for the fiscal year ending June 30, 1941." The Military Appropriation Act of September 9, 1940, 54 Stat. 872, made additional appropriations of money for the fiscal year 1941 for national defense purposes.

On October 17, 1940, in a letter to the Secretary of War, the President, under the Act of September 9, 1940, 54 Stat. 872, approved the construction of a TNT and DNT plant at Weldon Springs, Missouri (R. 51, 309). The Secretary of War directed the Quartermaster General of the Army to acquire a site for the plant in St. Charles County, Missouri (R. 52–53). At the direction of the Quartermaster General, Colonel R. D. Valliant, Quartermaster Corps, then in charge of the Real Estate Branch of the War Department, undertook the work of acquiring the land (R. 277).

On or about October 23, 1940, R. Newton McDowell of Kansas City, Missouri, called on Colonel Valliant in Washington, D. C., with reference to the War Department's program to acquire land for the Weldon Springs project through purchase (R. 277). McDowell had previously learned of this program and had already ascertained that the Kansas City Title and Insurance Company was

willing to perform the title work if called upon to do so (R. 88). After conferring with Valliant, McDowell submitted a proposal in the form of a letter dated October 23, 1940, that he, McDowell, be appointed "Optioner" for the Government; that he undertake to acquire options to purchase approximately 18,000 acres of land for the Weldon Springs project within 45 days or such extended period as the United States might require; that he diligently endeavor to obtain the land at the reasonable value thereof; that he obtain the title services of the Kansas City Title and Insurance Company at his own expense; and that for his services his sole compensation consist "of the five per cent (5%) commission in each purchase, to be paid by the vendor" (R. 231–233). The letter referred to a form of option to be used, under which the vendor would specify the price for which he would sell the land; agree to pay McDowell the 5% commission; agree to grant the Government the right of immediate use and occupancy of the land upon acceptance of the option; and agree to furnish the necessary title papers conveying the land to the United States "free and clear of all taxes, liens and encumbrances of every kind and character, including stamps, taxes and etc." and a certificate of title of the Kansas City Title and Insurance Company (R. 342–344). McDowell's proposal was accepted by Colonel Valliant acting on behalf of the United States (R. 233).

Thereupon McDowell went into the field and took up the work of obtaining the options. He called a meeting of the landowners in the area to be acquired, which was held on November 6, 1940, and was attended by many of the landowners, their attorneys, and interested persons. At this meeting he outlined to the landowners the method through which the Government would seek to purchase their property. (R. 109, 115, 141.) He announced that he had authority to ascertain from the landowners what they wanted for their property and to add to that sum his 5% commission and the title company's 1½% commission. He told the meeting that the Government would pay not only the value of the property, but also the commissions. (R. 62–65, 108–109, 115, 118, 140–141, 190, 199–202.) With reference to this meeting George H. Williams, former United States Senator from Missouri, testified (R. 108):

> Mr. McDowell spoke maybe two or three times. He was questioned by me and by Mr. Willson, and I think by Mr. Ford Thompson, as to his statement that he intended to include his commission in the purchase price, and his statement that such was his intention. I told him, in the presence of this crowd, that I didn't think I had ever seen a person who needed a criminal lawyer more than he—
>
> * * * * *
>
> And I urged the people present to beware of any such situation, and to be sure not to

> sign a contract like that, because if they did they would become involved with Mr. McDowell in a conspiracy to defraud the Government and I hoped that no person present would make such a contract.

An account of the meeting was carried the next day in the local newspapers (R. 192). Subsequent to the meeting and after conferences with McDowell, the Landowners' Committee announced in their circular (R. 236) that the United States would pay not only "the fair, current, market value of the land" but also "the legal costs and the commission to the War Department's Agent."

When McDowell sought to agree with the landowners upon the option prices, they followed the procedure outlined at the meeting and mentioned in the circular of the Landowners' Committee, i. e., they agreed upon the value of the property, and added to that the commissions, recorder's fees, and documentary and stamp taxes (R. 127–131, 140–141, 150, 163, 167–168, 173, 186–188, 196–197; and price breakdowns at R. 268–274, 328–332).

Within a few weeks McDowell obtained 270 options, which he submitted to Colonel Valliant for approval, and which were approved by Valliant on behalf of the United States (R. 280; 693–694). Under the provisions of these option contracts the United States entered into possession of the land early in December 1940 (R. 98–99, 468, 665). After many of the option contracts had been closed and conveyances made, the United States, having concluded an investigation of the

prices which it was paying for land in the Weldon Springs area, determined to repudiate the remaining option contracts on which no payments had been made and to resort to condemnation (R. 82, 255, 310–313, 694). This determination was thus described by the Under Secretary of War in a telegram to McDowell, dated March 18, 1941 (R. 255–256):

> Reurtel March 11 To Harry Hopkins Relative To Weldon Springs TNT Plant Near St. Louis Serious Questions Which Have Arisen Concerning This Project Including Lack Of Appraisals And Excessive Prices Resulting In Widespread Criticism Of War Dept. Require That Matter Of Payments Be Submitted For Consideration Of Federal Court Authorities This Policy Adopted Only After Exhaustive And Careful Consideration Your Refusal To Accept Proposed Reduction In Amount Of Commission In No Way Influenced Determination Of Policy To Resort To Condemnation Proceedings Estimated Compensation To Owners Will Be Deposited In Court Within Few Days And Immediate Partial Distribution Can Be Made In Discretion Of Judge The War Dept. Will Welcome Any Offer On Your Part To Cooperate On Re-Negotiation Of Options At Prices Which Will Warrant Closings On Acquisitions By Direct Purchase And Will Consider Any Offer From Owners Prior To Conclusion Of Condemnation Proceedings.
>
> Patterson Under Secy of War Wash DC.

In No. 31, a petition in condemnation and a declaration of taking were filed in April 1941 (R. 4–12). A judgment of condemnation on the declaration of taking was entered April 9, 1941 (R. 13–16). The taking included Tract No. 24/233, consisting of 33.33 acres of land, owned by James Karl Muschany and Vera Muschany. They had purchased the land in 1939 for $1,000 (R. 347, 355.) At the time the declaration of taking was filed, $950.00 was deposited as estimated compensation for the land (R. 12–13). On May 17, 1941, the Muschanys filed an answer to the petition in condemnation, in which they alleged that prior to the condemnation proceedings the Government had contracted to purchase the land at a price of $4,500.00, and they prayed that the court dispense with the appointment of commissioners and at once enter judgment fixing an award for the land at the contract price (R. 17–20). On April 3, 1942, the United States filed an amended reply to the answer, in which it alleged that the purchase contract was violative of public policy and various statutory provisions (R. 21–36).

Substantially the same proceedings were had in No. 32. A declaration of taking and a petition in condemnation were filed April 15, 1941 (R. 479–488). Judgment on the declaration of taking was entered the same day (R. 488–490). The taking included Tract No. 19, containing 94.46

acres of land, which was owned by William M. Andrews and Bertha Andrews. They had purchased it in 1934 for $1,750 and had expended possibly $500 for improvements. (R. 569, 572, 606.) $3,460.00 was deposited as estimated compensation for the land (R. 487). An answer was filed in which as in No. 31 a contract for the purchase of the land was alleged and a judgment sought fixing an award for the land at the contract price, which was $12,000.00 (R. 498–505). In an amended reply to this answer, the United States interposed the same defense as in No. 31 (R. 506–522).

Each case was tried separately on the issue as to the value of the land (R. 336–448, 543–655). In the case before him Judge Collet held the contract to be invalid as violative of the prohibition against cost-plus-a-percentage-of-cost contracts contained in the Act of July 2, 1940. *United States* v. *94.68 Acres of Land, St. Chas. Co., Mo.*, 45 F. Supp. 1016 (E. D. Mo. 1942). In the two cases here involved the court made findings and conclusions favorable to the condemnees, Judge Moore adopting, so far as applicable, those made by Judge Davis (R. 449–460, 656–657). The Government filed motions for new trials, which were denied (R. 460–466, 657–662, 665). On October 12, 1942, judgment was entered in No. 31 sustaining the validity of the contract, dispensing with the appointment of commissioners, and

making an award of $4,500.00 and interest (R. 466–468). A similar judgment was entered in No. 32 on November 5, 1942, the award being fixed at $12,000.00 and interest (R. 663–665). The circuit court of appeals reversed the two judgments, holding the option contracts invalid under the cost-plus-a-percentage-of-cost proviso of the Act of July 2, 1940 (R. 691–704).

SUMMARY OF ARGUMENT

1. The United States is not precluded from seeking a determination of just compensation for the taking of petitioners' lands because of the prices fixed in contracts of purchase under which the Government's purchasing agent was to receive five percent of the prices agreed upon. The conflict between the agent's self-interest and his duty to the Government was such that the United States is entitled to avoid the contracts. Cf. *Crocker* v. *United States*, 240 U. S. 74. The power of avoidance is not affected by the fact that the contracts were formally approved by an officer of the War Department. In reality that officer acted upon the recommendations of the purchasing agent without any independent means of investigating the prices. Cf. *United States* v. *Carter*, 217 U. S. 286, 299. Whether or not the prices arrived at by the landowners and the agent in the present cases are excessive, the power to disaffirm exists, for what is aimed at is the tendency to evil in arrangements of this kind. Numer-

ous federal statutes reflect the principle that agents of the United States are not to be given a pecuniary interest adverse to their duty to the Government.

In addition, the contracts violate the rule frequently applied by this Court, that contingent fees for the procurement of Government contracts are contrary to public policy. Thus, if petitioners' view of the transactions is accepted, that the contingent fee was to be paid by the vendors and not added to the price otherwise agreed upon as the value of the land, the arrangement cannot be defended. If, on the other hand, the view of the circuit court of appeals is accepted, that the evidence shows the commission was an additional amount included in the price payable by the Government, petitioners stand in no better case. The effect is that the Government would be called upon to pay both the probably inflated base price and also the commission itself. The standard Government procurement contracts are required to contain a warranty against the employment of contingent fee brokers; the agent here could not bring himself within any exception in such warranties, for he was not in any event engaged in an established brokerage business.

The court below held the contracts illegal under the statutory prohibition against the use of the cost-plus-a-percentage-of-cost system of contracting. It is believed that the contracts are voidable

even apart from this prohibition. They do, however, incorporate the very evil against which the prohibition is directed, that is, the addition of an incentive to inflate costs to the Government through the offer of a percentage of the base price, which is left to be determined in large part by those having an interest in increasing the cost. Recent statutory provisions limiting commissions on land purchase contracts to two percent of the purchase price do not authorize the payment of percentage commissions. Those provisions merely set a limit on the amount of fixed commissions which may be awarded.

2. The contracts were not ratified by the United States. In retaining possession of the land the Government indicated that the taking was ratified, and hence the Government was obligated to pay just compensation, cf. *United States* v. *North American Co.*, 253 U. S. 330; but the contracts themselves were plainly disaffirmed, and in fact the condemnation proceedings were brought within about four months of the original taking of possession. The Government stands ready to pay compensation for the value of the lands as of the date of the original taking, plus interest on that amount to the date when the estimated compensation was paid into court, and interest on any deficiency from the latter date to the date of payment.

I

ARGUMENT

The land purchase contracts were contrary to public policy and therefore the prices fixed therein are not binding in condemnation proceedings

1. *The antagonistic interests of the Government's purchasing agent.*—The precise issue in these cases is whether the Government is precluded from seeking a determination of just compensation for the taking of petitioners' land because of prices stipulated in contracts of purchase under which the Government's purchasing agent who negotiated the prices was to receive as a commission 5 percent of the prices agreed upon.[1] The judges of the court below held unanimously that the contracts were not binding upon the United States. The same conclusion was reached by Judge Collet in a companion case, 45 F. Supp. 1016 (E. D. Mo.), and by Judge Evans, dissenting, in *United States* v. *Grace Evangelical Church,* 132 F. (2d) 460, 462–463 (C. C. A. 7). The fundamental vice in the contracts, which in our view entitles the United States to avoid them, is the obvious

[1] Since the contracts provided that the prices agreed upon would determine the amount of the award in the event of condemnation (R. 344, 556), we concede that under *Danforth* v. *United States*, 308 U. S. 271, the prices would be binding if the contracts themselves were not avoidable. In this respect the contracts differ from that involved in *United States* v. *Two Acres of Land, etc., and Grace Evangelical Church*, pending on petition for certiorari, No. 456, present Term.

conflict which was established by the commission feature between the self-interest of the Government's agent and his duty to serve the interest of his principal, the United States. Whether his commission, increasing proportionately with the prices paid by the Government, was to be met by the vendors or by the United States does not affect the essential infirmity in the contracts, though it may perhaps affect the applicability of one or another of various statutory prohibitions and penalties. The incentive to negotiate for excessive prices exists whether the land owners were to pay 5 percent of the inflated value or were to have included in their remittances from the Government an additional 5 percent to be distributed to the Government's agent.

This essential vice in the contracts was succinctly described by Judge Evans, *supra,* 132 F. (2d) at p. 463, in discussing a similar arrangement for the purchase of land in another area:

> Sound reason and common sense, alike, condemn this contract as violative of sound public policy. Instead of protecting the public (the Government and the taxpayers), it furnished incentive for raids upon the Treasury.
>
> Herman was financially benefited by higher, not lower, purchase prices. Under the circumstances, the vendor was, of course, willing to pay a commission to the buyer's representative, for both were in-

> terested in boosting the price. But who was there to protect the U. S. Government?
>
> This is not like an agency contract between seller and a real estate agent where parties knew the agent was to receive a commission from the purchaser. Here, the agent had no limitation as to price. There was no one to check his price negotiations. There could be no ratification, in fact, no knowledge, of his loading the selling price to the financial advantage of himself and of the seller.

The responsible officers of the War Department itself came to a prompt realization that the contracts were indefensible. The telegram sent by the Under Secretary of War to McDowell, the Government's agent, has already been set forth (p. 7, *supra*). The Under Secretary had occasion to testify before a committee of the House of Representatives in April, 1941. At that time he stated (Hearings before Subcommittee of the Committee on Appropriations, House of Representatives, 77th Cong., 1st sess., on the Military Establishment Appropriation Bill for 1942, p. 80):

> Sites for cantonments, if not publicly owned, are generally acquired through land acquisition agencies of other Departments. In acquisitions for munitions plants, the practice at first was to retain the services of a real estate agent in the State where the land was located, on a commission basis,

> generally at 5 percent of the purchase price. That practice was not sound. The commissions were too high, and the use of any percentage system is open to the objection that the agent's financial interest is in favor of high prices. In December 1940 the practice was changed. The real estate branch has been directed to employ the Soil Conservation Service of the Department of Agriculture wherever practicable, and in other cases to retain real estate agents for a fixed fee. More recently we have reorganized the real estate branch. We have also reviewed earlier acquisitions which had been carried out on the percentage commission basis.

He proceeded to characterize the system of commissions to brokers employed by the Government for land acquisition as "a system that I will not defend." (*idem*, p. 106).

It requires no elaborate discussion to establish the conclusion that a conflict of interest such as that exhibited here entitles the United States to disaffirm the resulting contracts. Thus, in *Crocker* v. *United States*, 240 U. S. 74, the United States was held not liable on contracts made in its name for the purchase of articles where the agent of the United States actively engaged in the transactions had agreed to share commissions with an agent of the vendor; and this result was reached even though the vendor itself had not authorized and indeed was not aware of the arrangement. The governing principle in such cases, as in the

case of fiduciaries generally, was stated pithily in *Marsh* v. *Whitmore*, 21 Wall. 178, 183–184:

> Their union in the same person would at once raise a conflict between interest and duty, and, constituted as humanity is, in the majority of cases duty would be overborne in the struggle.

As the *Crocker* case, *supra*, makes clear, it is not only the illicit profit or commission which may be disavowed or recovered by the principal; the right to disaffirm extends to the natural fruits of the illicit arrangement and thus entitles the United States to avoid the contract made with petitioners. "The principle itself would be of no value if the very party whose rights were sacrificed were denied the benefit of it." *McGourkey* v. *Toledo & Ohio Railway*, 146 U. S. 536, 566.

It is no answer to suggest that the contracts were approved by an officer of the War Department after submission by McDowell. This fact could not cure the inherent vice in the system. The realities of the system when examined make plain, moreover, the vital character of McDowell's part in the transactions. It was he who represented the Government on the spot, setting up his own organization for the purpose of dealing with land owners. The negotiations were entrusted to his charge. What he submitted for approval was the merest summary of each proposed purchase, consisting of the name of the owner, the number of acres involved, and the price agreed upon in an

option contract negotiated by him and recommended by him for approval. Colonel Valliant, who gave formal approval, testified frankly to the procedure followed (R. 276–308).

The prices recommended by McDowell were not checked by any appraisals or first-hand investigation of the particular tracts; or record of sales in the area; at most, the prices were subject to comparison one with another on the basis of the bare recommendations of McDowell (R. 277, 281, 283, 305, 311). In only one instance was a price so recommended disapproved, and in that instance McDowell's recommendation was for a price of $10,000 notwithstanding the fact that earlier he had recommended approval of a price for the same property of $4,500 (R. 280–281). In these circumstances the critical nature of McDowell's negotiations is readily evident. *United States* v. *Carter*, 217 U. S. 286, presented a similar situation with respect to administrative approval of contracts tainted with a conflict of interest on the part of the Government's agent. There it appeared that a captain in the Army, having responsible functions with respect to construction contracts, had agreed to share to the extent of one-third in the profits of a certain partnership performing work for the Government. The Court said, discussing the relevance of approval of the contract by superior officers (p. 299): "It is undoubtedly true that the plans, the form of con-

tracts, the character and time of advertising, and acceptance of bids, as well as most matters involving the exercise of judgment and discretion during the execution of contracts, were reported to the War Department for its approval or rejection. Nevertheless it is most thoroughly made out that the action and recommendation of a local engineer officer in charge of such work practically determined the situation so long as he had the confidence of his superiors and kept within the general limits of the appropriation by Congress for the work in hand."

As the court below pointed out, it is unnecessary to consider whether in the particular contracts involved in these two cases the Government obligated itself to pay sums which were in fact excessive. The obvious conflict between the interest of the Government and that of its agent entitles the United States to avoid the contracts if in its judgment it is advisable to do so to safeguard the public interest. If this were not so the power to disaffirm would be lodged not in the party whose interests have been put in jeopardy but in a court or jury upon the basis of their own appraisal of loss in particular cases. Once the arrangement is shown to be inconsistent with sound public policy the power to avoid it is given absolutely. Thus, the disqualification of a trustee to purchase trust property, and the right of a beneficiary to disaffirm, do not depend on a showing

of loss in a particular case. "In this conflict of interest, the law wisely interposes. It acts not on the possibility that, in some cases, the sense of that duty may prevail over the motives of self-interest, but it provides against the probability in many cases, and the danger in all cases, that the dictates of self-interest will exercise a predominant influence, and supersede that of duty." *United States* v. *Carter,* 217 U. S. 286, 308–309, quoting from *Michoud* v. *Girod,* 4 How. 503, 555.

While it is unnecessary to consider the extent to which the purchase prices may have been inflated in the cases now before the Court, it may be appropriate to observe that the dual interest of McDowell, obvious enough on its face, was not without effect. McDowell generally accepted the owners' asking prices (R. 66–67, 140–141, 150, 163, 167–168, 196). The court below recounted certain illustrative transactions disclosed by the record, showing the dictates of self-interest in operation. The recommendation of an offer to sell for $10,000 after recommending a price of $4,500 for the same property was in fact followed by a third recommendation that a value of $4,800 in the event of condemnation would be a fair appraisal for the land (R. 264–267). Another landowner was told by an agent of McDowell that the latter would himself like to add $50 an acre to the owner's asking price, but the owner declined to adopt the suggestion (R. 197). Prices recommended and accepted included substantial sums for loss in salary of

partners, loss of business and of inventory, drainage taxes, and the like (R. 171, 172–173, 179, 267, 325–328).

The power of the United States to disaffirm the contracts need not depend on statutory prohibitions. Like the policy against contingent fees for the procurement of Government contracts (*Hazelton* v. *Sheckells*, 202 U. S. 71) the policy against making public contracts a source of private profit to the Government agents who negotiate them is a rule which "does not depend on reasoning technical in its character, and is not local in its application. It is based upon principles of reason, of morality, and of public policy. It has its foundation in the very constitution of our nature, for it has authoritatively been declared that a man cannot serve two masters, and is recognized and enforced wherever a well-regulated system of jurisprudence prevails." 2 Dillon, *Municipal Corporations* (5th ed. 1911), p. 1140. Judge Lurton, in *City of Findlay* v. *Pertz*, 66 Fed. 427, 435 (C. C. A. 6), said:

> * * * We know of no more pernicious influence than that brought about through a system of commissions paid to public agents engaged in buying public supplies. Such arrangements are a fruitful source of public extravagance and peculation. The conflict created between duty and interest is utterly vicious, unspeakably pernicious, and an unmixed evil. Justice, morality, and public policy unite in condemning such

contracts, and no court will tolerate any suit for their enforcement.

Buttressing this well-recognized policy, the federal statutes are replete with provisions which proscribe, and frequently impose penalties for, transactions in which agents of the United States are given a pecuniary interest adverse to their duty to the Government. Thus, Section 113 of the Criminal Code (18 U. S. C., sec. 203) makes it a criminal offense for an "officer or clerk in the employ of the United States" to "receive, or agree to receive, any compensation whatever for any services rendered or to be rendered to any person, either by himself or another, in relation to any proceeding, contract, * * * or other matter or thing in which the United States is a party or directly or indirectly interested, before any department * * *." This statute had its origin in the Act of June 11, 1864, c. 119, 13

[2] Cf. Dillon, *supra*, at pp. 1142–1143:

"The principles of the common law and of equity are generally supplemented and made more emphatic *by statutory enactments* prohibiting any municipal officer from being *interested directly or indirectly in any municipal contract* or in the rendition of services for the municipality outside of those required from him by virtue of his office. The statutes usually make a violation of their provisions a criminal offence entailing a forfeiture of office as well as punishment by fine or imprisonment, and they frequently declare that all contracts entered into in violation of their provisions shall be void. Such statutes are declaratory of and in aid of the principles of the common law, though, as we shall see, some difference in the resulting consequences of the illegality appea. ; in the decisions." [Italics in original.]

Stat. 123. A similar statute, likewise stemming from wartime experience, is Section 112 of the Criminal Code (18 U. S. C., sec. 202) derived from the Act of July 16, 1862, c. 180, 12 Stat. 577. This provision makes it an offense for any "officer or agent of the United States" to receive or agree to receive from any person any money or other valuable consideration for "procuring, or aiding to procure, any contract * * * from the United States or from any officer or department thereof * * *." Included in this statute is the provision that "Any such contract or agreement may, at the option of the President, be declared void." The legislative history makes it clear that the latter provision was regarded as declaratory of the "common principle" governing the effect of such a prohibition, and the reference to the President was intended to give the power of avoidance to the Executive as distinguished from the Legislative branch.[1] The Act of March 3, 1917,

[1] See Congressional Globe, 37th Cong., 2d sess., p. 2958. In response to a suggestion that the phrase "at the option of the authority of the United States making the same" be adopted, Senator Fessenden replied: "'Option of the President of the United States' would be better; otherwise it might be construed to require an act of Congress." Power thus vested in the President has frequently been construed to mean authority exercised through the appropriate department heads. E. g., *Wilcox* v. *McConnel*, 13 Pet. 498, 512; *French* v. *Weeks*, 259 U. S. 326.

The prevailing attitude toward the 1862 legislation is reflected in the statement of Senator Bingham (Congressional Globe, 37th Cong., 2d sess., p. 3261): "There may be some confusion in the language, but on looking at the bill the gen-

c. 163, 39 Stat. 1106 (5 U. S. C., sec. 66), makes it an offense for any "Government official or employee" to receive any salary in connection with his services except from the federal Government or the government of a state, county or municipality, and makes it an offense for any person to contribute to or in any way supplement the salary of any Government official or employee for the services performed by him for the United States. Section 41 of the Criminal Code (18 U. S. C., sec. 93), derived from the Act of March 2, 1863, c. 67, 12 Stat. 698, makes it an offense for an officer or agent of any corporation or association, or any member or agent of a firm, or any "person directly or indirectly interested in the pecuniary profits or contracts of such corporation," association or firm, to be employed or to act "as an officer or agent of the United States for the transaction of business with" such corporation, association or firm.[4]

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tleman will find that, so far as officials are concerned, it is as comprehensive now as the wit of man can make it." Nevertheless, at the succeeding session of Congress the legislation was extended to include "agents" of the Government. Congressional Globe, 37th Cong., 3d sess., pp. 1018, 1175.

[4] Charles E. Hughes, in his report and recommendations on aircraft production, rendered on October 25, 1918, stated:

"3. The absence of proper appreciation of the obvious impropriety of transactions by Government officers and agents with firms or corporations in which they are interested compels the conclusion that public policy demands that the

The scope and importance of the policy thus reflected in Congressional legislation have frequently been emphasized in opinions of the Attorneys General. Thus, in 33 Op. A. G. 273, 275, it was said: "The object of the provision in the Act of March 3, 1917 (ch. 163), was that no Government official or employee should serve two masters to the prejudice of his unbiased devotion to the interests of the United States." And in 40 Op. A. G., No. 42, dated March 31, 1942, in response to an inquiry whether officers of certain companies might be employed to advise the Signal Corps on facilities, personnel, and the like, available in those companies, it was stated, after referring to 18 U. S. C., sec. 93 and 5 U. S. C., sec. 66: "The purposes of the two statutes quoted are similar. Both are intended to prevent a conflict between self interest and the interests of the Government. A man whose duty it is to serve the public weal as a Government servant should not be put into a position where he can also serve his selfish interests. The law has long recognized this fundamental problem. *Michoud* v. *Girod,* 4 How. 503, 555; *United States* v. *Carter,* 217 U. S. 286,

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statutory provisions bearing upon this conduct should be strictly enforced. It is therefore recommended that the officers found to have had transactions on behalf of the Government with corporations in the pecuniary profits of which they had an interest should be prosecuted uinder section 41 of the Criminal Code." (57 Cong. Rec. 883, 914.)

306."[5] As the court below pointed out, there is no indication that the legal advice of the Attorney General was sought prior to the arrangements entered into for the acquisition of the land here involved.[6]

2. *The payment of a contingent fee by the vendors for the procurement of the contracts of sale.*—Even if we disregard the dual and conflicting interests of McDowell, the contracts may be avoided by the United States because of the feature whereby the vendors agreed to pay to him a commission contingent upon the execution of the contracts with the United States and directly proportionate to the price obtained. It has long been recognized by this Court that contingent fees for the procurement of Government contracts are contrary to public policy, their tendency being to increase costs to the public and to result in the award of Government contracts as a consequence of illegitimate considerations. *Tool Company* v.

[5] Cf. Landis, *Statutes and the Sources of Law*, in *Harvard Legal Essays* (1934) 213, 222: "A course of legislation dealing continuously with a series of instances can be made to unfold a principle of action as easily as the sporadic judgments of courts." This may be true even where, as is not the case here, the legislation marks a departure in policy. See *Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381, 391 note 4.

[6] Compare the expression of disbelief by a former United States Senator when McDowell stated at a public meeting that the arrangements had the approval of the Attorney General (R. 106). Another lawyer, "rather amused" by McDowell's statement of the arrangement (R. 204), told the meeting that he was "greatly surprised that the Government would ever consent to such a thing" (R. 203).

Norris, 2 Wall. 45, 54–56; *Oscanyan* v. *Arms Company,* 103 U. S. 261, 271–273; *Hazelton* v. *Sheckells,* 202 U. S. 71, 79; *Crocker* v. *United States,* 240 U. S. 74, 78–79; cf. *American Seating Company* v. *Zell,* No. 613, 1943 Term, decided May 8, 1944. Petitioners argue strenuously that their actual agreements with McDowell were as the face of the contracts indicated, namely, that the commissions to him were to be paid by them as vendors, and were not to be paid by the Government as an addition to the value of the land. The district court found (R. 451, 656) that with respect to the options in the two cases here involved there is no evidence that the option price included the amount which the defendants asked for the land plus McDowell's fee of 5 percent of the sales price. The court did find, however, that (R. 452):

> The plan carried out by the Government contemplated that the price for which options would be taken should not only include the value of the land, but also the fee of the Government's soliciting agent, the fee of the title examiner, the cost of revenue stamps, the fee for recording the conveyances, and other incidental expenses.

The circuit court of appeals held that the evidence as a whole clearly showed an understanding on the part of the landowners and McDowell (R. 62–65, 108–109, 115, 118, 140–141, 190, 192, 199–202, 236) as well as Colonel Valliant (R. 298–299) that the commissions were to be added to the

agreed value of the land, and that this was the practice generally followed in fixing option prices (R. 127–131, 140–141, 150, 163, 167–168, 173, 186–188, 196, 268–274, 328–332).

If petitioners' view of the commission payments were to be accepted, the transactions would run afoul of the policy against the payment of contingent fees for the procuring of Government contracts. The principle long ago recognized in the decisions of this Court was embodied beginning in 1918 in a standard form of warranty clause in Government procurement contracts.[7] See 10 Code of Federal Regulations (Cum. Supp. 1943) Section 81.323. If it is of any significance in this connection that the contingent fee was to be paid to a person designated to represent the interests of the Government, that circumstance only serves to aggravate the evil, since it removes one check

[7] The origin and evolution of this clause are described in a memorandum filed as an exhibit in Hearings before the Committee on Naval Affairs, House of Representatives, 78th Cong., 1st sess., on Investigation of the Progress of the War Effort, pp. 380–385. See also H. Rep. No. 353, 78th Cong., 1st sess., pp. 5–6. The warranty clause provides that it "shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business." McDowell would not qualify under any construction of the exemption. He was not even a professional or established real estate broker, but was in the construction business (R. 212, 250, 693, n. 4). Though present at the trial, McDowell did not testify (cf. R. 259).

which might otherwise exist against the self-interest of the contingent-fee procurement agent.

If we accept the view of the transactions taken by the circuit court of appeals, which we believe to be clearly supported by the evidence, to the effect that the commissions were in fact included within the price payable by the United States as an addition to the net agreed-upon value of the land, petitioners stand in no better case. Payment by the Government of the contingent fee for which the vendors were formally liable by contract simply enhances the inflationary effect on the cost to the United States. A somewhat comparable situation is presented in the use of contingent fees by sub-contractors in procuring work under principal contracts with the Government where the latter contracts are on a cost-plus-fixed-fee basis. It has been recognized that the use of contingent fees in the procurement of sub-contracts in these circumstances is an evil which should be met no less than where the device is used in contracts directly with the Government, for in effect the Government would be called upon to pay as costs the possibly inflated expenses attributable to the sub-contracts and also the commission itself. Accordingly, by Executive Order contingent fees in sub-contracting which are unrelated to the services performed or where the only service performed is the obtaining of the order, are not to be permitted. See Executive

Order 9001, 6 Fed. Reg. 6787; 10 Code of Federal Regulations (Cum. Supp. 1943) Section 81.1181; cf. *American Seating Company* v. *Zell, supra.*[5] The problem of sub-contracts, of course, goes beyond the necessities of the present case; it is referred to here only to indicate that if the commission agreed to be paid by the vendors was in fact paid by the United States, as we think it was, the arrangement is none the less in conflict with the policy against burdening the United States with costs and inflated prices attributable to the contingent fee device.

3. *Cost-plus-a-percentage-of-cost feature.*—The circuit court of appeals, in sustaining the Government's right to condemn without regard to the prices fixed in the contracts, held the contracts to be in violation of the proviso in Section 1 of the Act of July 2, 1940, 54 Stat. 712, which states that "the cost-plus-a-percentage-of-cost system of contracting shall not be used under this section; but this proviso shall not be construed to prohibit the use of the cost-plus-a-fixed-fee form of contract

[5] By an amendment to the Renegotiation Act, Act of February 25, 1944, Public Law 235, 78th Cong., 2d sess., sec. 701 (b), sub-contracts, as defined for the purpose of renegotiation, are stated to include contracts under which any amount is payable contingent upon the procurement of a contract or sub-contract or determined with reference to the amount of such a contract or sub-contract, or under which any part of the services performed or to be performed consists of the soliciting, attempting to procure, or procuring a contract or contracts with a department, or a sub-contract or sub-contracts.

when such use is deemed necessary by the Secretary of War."* The purchase of land for the Weldon Springs project was undertaken pursuant to the authority contained in that Act, whereby the Secretary of War was authorized to provide for the necessary construction of "plants * * * (including Government-owned facilities at privately owned plants and the expansion of such plants, and acquisition of such land, and the purchase or lease of such structures, as may be necessary), for the development, manufacture, maintenance, and storage of military equipment, munitions, and supplies, and for shelter; * * *." While the appropriation Act of June 26, 1940, 54 Stat. 601, 602, was referred to in the declarations of taking (R. 11, 485), and the supplemental appropriation Act of September 9, 1940, 54 Stat. 872, 873, in the President's authorization of the project (R. 51), both Acts are subject to the provisions of the Act of July 2, 1940, which relate to the use of "moneys appropriated for the War Department for national-defense pur-

*The proviso of this section has been continued in effect and made applicable to moneys appropriated to the War Department for war purposes. Act of June 30, 1941, sec. 9, 55 Stat. 393, and Act of June 5, 1942, sec. 13, 56 Stat. 317, 50 U. S. C. App. (Supp. III), sec. 773. The settled policy of Congress to outlaw cost-plus-a-percentage contracts is also shown by other statutes in which similar provisos appear. Act of June 28, 1940, sec. 2 (a), 54 Stat. 676, 677; Act of May 2, 1941, sec. 2 (c), 55 Stat. 148; Act of December 18, 1941, Title II, sec. 201, 55 Stat. 839.

poses for the fiscal year ending June 30, 1941 * * *."

We believe that the contracts in question may be disaffirmed independently of the Act of July 2, 1940. That Act is an additional embodiment of the principle which outlaws the furnishing of incentives to increase the financial burden of Government contracts. The Act recognizes that the cost-plus-a-percentage-of-cost system of contracting is subject to an inflationary tendency notwithstanding the theoretical safeguard of supervised cost accounting. The present contracts are in substance cost-plus-a-percentage-of-cost contracts for the "acquisition of * * * land," subject to the same inherent tendency toward increased prices by virtue of the added incentive to enhance the prices demanded of the Government.[10] Petitioners in No. 32 (Brief, pp. 40–41), while denying the applicability of this statutory prohibition, concede that if the Government had agreed that McDowell might purchase the land from the owners and resell it to the Government at cost to him plus a 5-percent commission, the transaction would plainly be covered. In the present cases the evil is even more pronounced, for McDowell

[10] The legislative history of the Act casts no light on the intended scope of the prohibition. As it passed the Senate, the bill prohibited the cost-plus system; in conference this was changed to the cost-plus-a-percentage-of-cost system. H. Rep. 2578, 76th Cong., 3d sess., p. 6; H. Rep. 2685, *id.*, p. 6; 86 Cong. Rec. 7839, 7841, 7843.

was not obliged to take any risk of purchase on his own part. Petitioners contend also that the contracts in question are cost-plus-a-fixed-fee contracts, since at the time of acceptance by the United States the prices as well as McDowell's commission were definitely fixed. Likewise, the district court regarded the vice of the cost-plus-a-percentage-of-cost system to be the uncertainty in the amount of the base price and particularly of the commission. But it is clear that the vice does not lie primarily in the uncertainty of the amount; it rests in the inherent tendency of the system to cause padding of prices. That the present contracts and the more typical cost-plus-a-percentage-of-cost contracts, as in the shipbuilding industry, are fraught with the same evil, was recognized by Judge Collet. *United States* v. *94.68 Acres of land, St. Chas. Co., Mo.*, 45 F. Supp. 1016, 1019–1020. He pointed out that the essential similarity lies in the likelihood of swelling of the costs when the proposed bills are presented to the United States, in the one case through the padding of expense items and in the other through the inclusion of questionable amounts in the negotiated price.

Petitioners in No. 32 have pointed out that Congress has recently provided in Section 12 of the Military Appropriation Act of 1944, 57 Stat. 347, that no part of the money appropriated thereunder "shall be expended for the payment of any commission on any land purchase contract in excess of 2

per centum of the purchase price" (Brief, p. 17). But the legislative history shows that this provision does not authorize the payment of commissions to purchasing agents adjustable according to the purchase price. On the contrary, the provision merely limits the absolute amount of any commission which may be paid by the United States in connection with land contracts. The provision appears to have originated in the Naval Appropriation Act of 1942, 55 Stat. 151, 177. It was modeled upon a provision limiting the fees payable to outside engineers and architects to 6 percent, and under that provision it is understood that the fees are to be fixed in amount, the designated percentage constituting a ceiling for the fixed amount. See Hearings before the Subcommittee of the Committee on Appropriations, House of Representatives, 77th Cong., 1st sess., on the Navy Department Appropriation Bill for 1942, pp. 502–504, 505–509; Hearings before the Subcommittee of the Committee on Appropriations, U. S. Senate, 77th Cong., 1st sess., on the Military Establishment Appropriation Bill for 1942, pp. 46–50, 53.[11] Percentage commissions for the acquisition of land have not been authorized.

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[11] General Somervell, testifying with respect to the precedent of the limitation on engineers' fees, stated:

"That is, we give him a certain sum of money. He does not know anything about the percentage. We offer him

II

The contracts were not ratified by the United States

It is contended by the petitioners that the United States ratified the contracts by virtue of the fact that the War Department remained in possession of the land after investigating the cir-

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$100,000, $50,000, or $200,000 for doing the job, and he waives all claims on account of extras when he signs the contract. So if it costs twice that much, he gets nothing more." (Senate Hearings, *supra*, p. 49.)

Similarly, Under Secretary Patterson testified:

"He gets a fixed fee, in a sum of money, which is calculated generally as a certain percentage of estimated cost; but it remains constant once determined, whatever the actual cost, and unless the plant is a different plant from the one originally contemplated, he is held down to his original fee" (*id.* p. 31).

The Committee reports and debates do not cast additional light on the matter. The 2 percent limitation in the Naval Appropriation Act of 1942 was recommended by the conference committee after the Senate had passed a 3 percent limitation. See S. Rep. No. 116, 77th Cong., 1st sess., p. 4; H. Rep. No. 454, 77th Cong., 1st sess., p. 4; 87 Cong. Rec. 2432, 3404–3408.

Analogous limitations found in federal statutes are collected in Hensel and McClung, *Profit Limitation Controls Prior to the Present War* in *Law and Contemporary Problems*, Autumn 1943, 187, 212, note 141. These are all limitations on fixed fees.

The distinction between these fixed fees with a maximum limit and percentage-of-cost fees which provide incentive for cost increases, as in the present case, is set forth in the opinions of the Judge Advocate General cited in Pet. Brief in No. 32, pp. 36–38 (Bulletin, J. A. G., July 1943, p. 278; *id.*, Dec. 1943, p. 483). The Comptroller General has quoted with approval from Judge Collet's opinion, *supra*, p. 33. 22 Dec. Comp. Gen. 784.

cumstances surrounding the contracts. The retention of possession was, of course, continuous during the period of about 4 months between taking possession and the bringing of condemnation proceedings, and it has continued thereafter. But if anything was thereby ratified, it was the taking and not the contracts. The Secretary of War had authority, which we do not understand to be disputed, to take the property in question for purposes of an ordnance plant. Having this authority, he was in a position to take the property with or without a contract or condemnation, with the consequence that the United States would be obligated on an implied promise to pay just compensation. This is made clear by one of the cases cited by petitioners (Brief in No. 31, p. 26), *United States* v. *North American Company,* 253 U. S. 330. There it was held that since Congress had authorized a taking by the Secretary of War, he could ratify the taking of possession by subordinates and thus obligate the Government to pay compensation. In the present case, so far as the contracts are concerned, nothing could be plainer than that the responsible officers of the War Department disaffirmed them. This is clear both from the action of the War Department in withholding payments, as explained in the telegram of Under Secretary Patterson (R. 255–256), and from the action of the Secretary of War in authorizing and directing the filing of a declaration of taking in condemnation (R. 10–12).

What has been said with reference to ratification has assumed that the contracts might have been affirmed by the War Department. This possibility would probably have existed if the contracts were deemed contrary to public policy or the fruit of agreements prohibited by statute, since in such cases the party for whose benefit the statutory protection is given has the privilege of electing to affirm or disaffirm. If, however, the contracts are regarded as in violation of the cost-plus-a-percentage-of-cost provision, which is a direct prohibition of such contracts, ratification would not be possible save by Congress. In the present cases it is unnecessary to pursue the inquiry, since, as has been pointed out, there was in fact no purported ratification of the contracts.

The cases cited by petitioners on this point (Brief in No. 31, p. 26) are not apposite. *United States* v. *North American Company,* 253 U. S. 330, has already been discussed. *City of Findlay* v. *Pertz,* 66 Fed. 427 (C. C. A. 6) held that the jury might consider whether there had been a ratification by the governing board of a municipal corporation after a contract for personal property had been entered into by an employee in breach of fiduciary duty; there was no authority in that case to take possession of the property independently of contract. In *In Re Cuban-Atlantic Transport Corp.,* 57 F. (2d) 963 (C. C. A. 2) it was held that the board of directors of the

Shipping Board had acquiesced in and ratified a contract made by a subordinate with a purchaser who had been substituted for the purchaser originally approved; the case involved simply an excess of delegated authority by a subordinate, and not a question of illegality or public policy.

In retaining the property the United States is not seeking to enjoy its benefits without compensation. On the contrary, the Government stands ready to pay the fair value of the land as of the date of original taking of possession, with interest on that amount to the date of making the deposit of estimated compensation, and with interest on any deficiency until paid. Thus there is not presented the question in *Pan-American Petroleum Co.* v. *United States*, 273 U. S. 456, 503–510, where it was held that any compensation for property acquired illegally and as part of a fraudulent plan must be sought from Congress and would not be made a condition of rescission and an accounting. Cf. *Restatement of Contracts*, sec. 480.

A word should perhaps be added to meet the possible contention that the situation confronting the officers charged with the acquisition of land for the Weldon Springs project was so exigent that all normal safeguards could justifiably be abandoned. It is true that we make no suggestion of fraud on the part of the officials

involved, and it may freely be acknowledged that the arrangement with McDowell was motivated by considerations of haste. But fraud is not the only matter which will serve to set aside a public contract; the actions of contracting officers must be examined "to guard the public against losses and injuries arising from the fraud or mistake or rashness or indiscretion of their agents * * *." *Hume* v. *United States*, 132 U. S. 406, 414.

Neither in congressional enactment nor in the realities of the situation could there be found justification for the extraordinary procedure adopted. It appears from the testimony that, faced with the necessity of acquiring land for over 100 projects, the Chief of the Real Estate Section of the Quartermaster Corps was able to arrange for purchases in more than 100 of these through regularly employed personnel or other agencies of the Government, and resorted to brokers with a fixed fee in two instances, while employing the percentage commission device in eight (R. 288). Shortly after the events here in question the Real Estate branch was reorganized and the practices here condemned were abandoned.[12] Moreover, condem-

[12] See testimony of the Under Secretary of War, Hearings before the Subcommittee of the Committee on Appropriations, House of Representatives, 77th Cong., 1st sess., on the Military Establishment Appropriation Bill for 1942, p. 80; H. Rep. No. 2272, 77th Cong., 2d Sess., p. 20. On December 16, 1941, the Construction Division of the Quartermaster Corps was transferred to the Corps of Engineers. *Id.* p. 4.

nation was available in an expeditious form. Under the Act of July 2, 1917, c. 35, 40 Stat. 241, as amended, 50 U. S. C. sec. 171, the Secretary of War was authorized in time of war, or the imminence thereof, upon the filing of a petition for the condemnation of any land, to acquire immediate possession and occupancy for military purposes. (Cf. R. 253, 292.) Also, Congress had removed the requirement that title be approved by the Attorney General prior to construction for the Military Establishment. Act of September 9, 1940, c. 717, 54 Stat. 872, 873. The abandonment of recognized principles of public contracting disclosed by the present cases cannot be justified by considerations of urgency.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgments below should be affirmed.

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APPENDIX

Act of July 2, 1917, c. 35, 40 Stat. 241; Apr. 11, 1918, c. 51, 40 Stat. 518, 50 U. S. C. § 171:

The Secretary of War may cause proceedings to be instituted in the name of the United States, in any court having jurisdiction of such proceedings for the acquirement by condemnation of any land, temporary use thereof or other interest therein, or right pertaining thereto, needed for the site, location, construction, or prosecution of works for fortifications, coast defenses, military training camps, and for the construction and operation of plants for the production of nitrate and other compounds and the manufacture of explosives and other munitions of war and for the development and transmission of power for the operations of such plants; such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted: *Provided,* That when the owner of such land, interest, or rights pertaining thereto shall fix a price for the same, which in the opinion of the Secretary of War shall be reasonable, he may purchase or enter into a contract for the use of the same at such price without further delay: *Provided further,* That the Secretary of War is authorized to accept on behalf of the United States donations of land and the interest and rights pertaining thereto required for

the above-mentioned purposes: *And provided further,* That when such property is acquired in time of war, or the imminence thereof, upon the filing of the petition for the condemnation of any land, temporary use thereof or other interest therein or right pertaining thereto to be acquired for any of the purposes aforesaid, immediate possession thereof may be taken to the extent of the interest to be acquired and the lands may be occupied and used for military purposes.

Act of February 26, 1931, c. 307, § 1, 46 Stat. 1421, 40 U. S. C. § 258a:

In any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto--

(1) A statement of the authority under which and the public use for which said lands are taken.

(2) A description of the lands taken sufficient for the identification thereof.

(3) A statement of the estate or interest in said lands taken for said public use.

(4) A plan showing the lands taken.

(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so re-

ceived by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable.

Section 1 of the Act of July 2, 1940, 54 Stat. 712:

That (a) in order to expedite the building up of the national defense, the Secretary of War is authorized, out of the moneys appropriated for the War Department for national-defense purposes for the fiscal year ending June 30, 1941, with or without advertising, (1) to provide for the necessary construction, rehabilitation, conversion, and installation at military posts, depots, stations, or other localities, of plants, buildings, facilities, utilities, and appurtenances thereto (including Government-owned facilities at privately owned plants and the expansion of such plants, and the acquisition of such land, and the purchase or lease of such structures, as may be necessary), for the development, manufacture, maintenance, and storage of military equipment, munitions, and supplies, and for shelter; * * * *Provided further*, That the cost-plus-a-percentage-of-cost system of contracting shall not be used under this section; but this proviso shall not be construed to prohibit the use

of the cost-plus-a-fixed-fee form of contract when such use is deemed necessary by the Secretary of War.

Criminal Code, sec. 112, 18 U. S. C., sec. 202:

Whoever, being elected or appointed a Member of or Delegate to Congress, or a Resident Commissioner, shall, after his election or appointment and either before or after he has qualified, and during his continuance in office, or being an officer or agent of the United States, shall directly or indirectly take, receive, or agree to receive, from any person, any money, property, or other valuable consideration whatever, for procuring, or aiding to procure, any contract, appointive office, or place, from the United States or from any officer or department thereof, for any person whatever, or for giving any such contract, appointive office, or place to any person whomsoever; or whoever, directly or indirectly, shall offer, or agree to give, or shall give, or bestow, any money, property, or other valuable consideration whatever, for the procuring, or aiding to procure, any such contract, appointive office, or place, shall be fined not more than $10,000 and imprisoned not more than two years; and shall, moreover, be disqualified from holding any office of honor, profit, or trust under the Government of the United States. Any such contract or agreement may, at the option of the President, be declared void.

Criminal Code, sec. 113, 18 U. S. C., sec. 203:

Whoever, being elected or appointed a Senator, Member of or Delegate to Con-

gress, or a Resident Commissioner, shall, after his election or appointment and either before or after he has qualified, and during his continuance in office, or being the head of a department, or other officer or clerk in the employ of the United States, shall, directly or indirectly, receive, or agree to receive, any compensation whatever for any services rendered or to be rendered to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party or directly or indirectly interested, before any department, court martial, bureau, officer, or any civil, military, or naval commission whatever, shall be fined not more than $10,000 and imprisoned not more than two years; and shall moreover thereafter be incapable of holding any office of honor, trust, or profit under the Government of the United States.

U. S. GOVERNMENT PRINTING OFFICE 1944

SUPREME COURT OF THE UNITED STATES.

Nos. 31 and 32.—October Term, 1944.

James Karl Muschany and Vera Muschany, Petitioners, 31 *vs.* The United States of America. William M. Andrews and Bertha L. Andrews, Petitioners, 32 *vs.* The United States of America.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[February 5, 1945.]

Mr. Justice Reed delivered the opinion of the Court.

Writs of certiorari were allowed to petitioners by this Court in these two cases to review the action of the Circuit Court of Appeals for the Eighth Circuit.[1] That appellate court reversed the action of the District Court of the Eastern District of Missouri which had upheld the validity of contracts between petitioners and the United States for the purchase of land for the Weldon Springs, Missouri, ordnance plant.[2] The contracts were pleaded by petitioners as defendants in eminent domain suits to establish the proper condemnation award.

The petitions for certiorari were granted, 321 U. S. 760, because of asserted conflict with *United States* v. *Grace Evangelical Church*, 132 F. 2d 460. Jurisdiction of this Court rests on Section 240 of the Judicial Code.

Under the authority of the Second Supplemental National Defense Appropriation Act of 1941, 54 Stat. 872, the President approved the Weldon Springs project on October 17, 1940. Pursuant to this approval, the War Department claims that it proceeded to acquire the necessary land under the act of July 2, 1917, 40 Stat. 241, as restricted by the National Defense Act of July 2, 1940, 54 Stat. 712. The statutory authority of the War Department to proceed as it did is not questioned except on the issue of

[1] United States v. Muschany, 139 F. 2d 661.

[2] United States v. Certain Land, etc., 46 F. Supp. 921.

whether the purchase contracts entered into in acquiring the needed land violate the first section of the act of July 2, 1940, which provides:

"*Provided further*, That the cost-plus-a-percentage-of-cost system of contracting shall not be used under this section; but this proviso shall not be construed to prohibit the use of the cost-plus-fixed-fee form of contract when such use is deemed necessary by the Secretary of War." 54 Stat. 713.

The duty to act for the War Department in obtaining the land lay in the office of the Quartermaster General and specifically in the Real Estate Branch of that office. In an effort to expedite the acquisition of the needed land, the head of that branch, Colonel R. D. Valliant, contracted with R. Newton McDowell to act as the agent for the Government in securing options, on forms approved by the United States and attached to the employment contract, from the owners for submission to and acceptance by the United States. Mr. McDowell's compensation for acting as agent was a "five per cent (5%) commission . . . to be paid by the vendor."[3]

The employment of McDowell as agent to secure options for the United States was confirmed by the War Department to the Citizens Committee, an informal organization of those who owned property which was needed for the proposed project. McDowell went to work to carry out his contract. He held meetings at which he explained to the landowners the plan to secure options and the

[3] The pertinent parts of the McDowell agency contract are:

"3. The Optioner shall diligently endeavor to acquire such options, not only within such time, but at the reasonable value of the land to be acquired, and subject at all time to the directions of the Government. The form of option contracted to be executed, and all terms, convenants and conditions thereof, shall be on the form approved by the Government, and a copy of which is to be attached hereto and made a part hereof. It is understood that the Government is to have the exclusive right to take up or reject any option to any parcel of land optioned by said Optioner hereunder, except as hereinafter provided.

"4. . . . The Optioner shall procure from the vendors in all cases where options are accepted on behalf of the United States, an order to the Kansas City Title and Insurance Company, to prepare certificates of title and deeds and it shall be his responsibility to see that said certificates of title and deeds are transmitted to the proper Government official for examination. The certificates of title, to be furnished by The Kansas City Title and Insurance Company will be on forms similar to the one attached hereto and made a part hereof and funds to effect closing of purchases by the Title Company will be furnished by the Government to the Title Company in form of checks payable to each vendor in the amount of the purchase price set forth in the accepted options."

"8. For all services hereunder the compensation of the Optioner shall consist solely of the five per cent (5%) commission in each purchase, to be paid by the vendor, as more specifically set forth in the form of option attached hereto and made a part hereof."

option form itself. From his explanation the landowners must have understood that their sale price would have deducted from it McDowell's commission and other expenses. This was also the understanding of the Government, as is shown not only by the documents themselves which were approved by the Government but also specifically by the testimony of Colonel Valliant. While McDowell was employed and his commission set by the Government, it was arranged that McDowell should collect his money from the vendor so that a single voucher would cover the purchase price and the expenses.

The approved form of option, which was a part of McDowell's contract with the Government, was used by McDowell in the particular transactions which are under examination in these proceedings. The option accords with the requirements of the McDowell contract and in addition provides for an agreed valuation at the option price in case of condemnation.[4] The offer was accepted by the Government.

There were a large number of landowners in the required area. Options were obtained from 270, including the petitioners, and with one exception the options were accepted by the Government at the optioned price. Almost half of the contracts were closed by acceptance of deeds and payment of the price. Criticism of the prices and manner of purchase developed and the War Department repudiated the remaining contracts and turned to condemnation. The repudiation followed upon the conclusion among other things that the contracts violated the statutory provision against the cost-plus-a-percentage-of-cost system of contracting, page two, *supra*, and were contrary to public policy because of the

[4] "Upon exercise of this option by the Government, the undersigned agrees to pay to R. Newton McDowell a commission of five per cent (5%) of the gross sales price as full payment for the services of said R. Newton McDowell in procuring such sale, preparing the deed or deeds for the conveyance of said land and arranging for settlement and closing of the transaction."

"Upon furnishing of final certificate of title as above showing title to be vested in the United States of America, the agreed purchase price above mentioned will be paid by the Government to the undersigned.

"If for any reason the title to the land is not approved by the Attorney General, the Government will proceed to acquire the land by condemnation proceedings instituted in the District Court of the United States in which said property is located, under a consent verdict fixing the award at the agreed valuation and in accordance with all the terms and provisions of this option and will upon filing its petition in such proceedings deposit said agreed purchase price with the clerk of said court, same to be disbursed by said officer pursuant to the decree entered in such condemnation proceedings."

contingent interest of McDowell, which was antagonistic to the Government.

Petitioners' options were among those accepted only to be repudiated later, the Government then instituting condemnation proceedings to obtain petitioners' lands. In the two condemnation proceedings instituted against petitioners judgments were entered upon a declaration of taking which vested titles in the United States. 46 Stat. 1421. Thereafter the petitioners here filed their answers in which they consented to the condemnation and demanded that the price which was fixed in the option, accepted by the Government, be adopted by the trial court as just compensation. In reply the Government set up its repudiation of the contracts on numerous grounds including fraud, such unfairness to the Government because of gross overvaluation that the contract should not be enforced in equity and good conscience as well as the disregard of the statutory proscription and public policy, which was referred to in the preceding paragraph as the ground for repudiation.

The two cases were decided in favor of the validity of the contracts and the compensation was fixed at the price stated in the contract without revaluation. Consequently there was no occasion for the trial courts to determine whether valuation measured by just compensation would have varied from the agreed price. The Government makes no objection to this manner of determining compensation if the accepted options (contracts) are valid. Compare *Danforth* v. *United States,* 308 U. S. 271, 282. In one case the findings of fact and a comment appear as a memorandum opinion in *United States* v. *Certain Land, etc.*, 46 F. Supp. 921. In the other case, the decree was entered without separate findings of fact or opinion after adoption of the memorandum in the first case. We perceive nothing in the record to distinguish the cases here and shall dispose of them in a single opinion.[5]

The following determination appears in the opinion of the trial court for these cases, 46 F. Supp. at page 928:

"There is an absence of any showing that facts were concealed, that misrepresentations were made, or that duress was used. The

[5] A stipulation consolidates the record of the two cases before us and a third case, not here involved, United States *v.* 94.68 Acres of Land, St. Chas. Co., Mo., 45 F. Supp. 1016, and authorizes its use "as a part of the record in each of the two" cases here on review. While the cases have not been consolidated, one was set on our docket for hearing following the other, the United States has filed a single brief and petitioners a joint reply brief.

price stated in the option contract is not unconscionable. There is no fraud, actual or constructive, in this case."[6]

As a result of this conclusion, the issues of corrupt action in these two instances are decided contrary to the Government's contention at the trial. No such contention was made by the Government here. The findings also stated, at page 925:

"There is no evidence that the option price of forty-five hundred dollars included the amount the defendants asked for the land plus McDowell's fee of 5% of sale price, the Kansas City Title Insurance Company's fee of 1½% for examining title, the stamp tax or the recording fee."

We treat the finding and determination as applicable to both cases.

On appeal the Circuit Court of Appeals found, contrary to the trial court's finding quoted above, that the commission and expenses were added to the vendors' net price. We agree with the appellate court. While no direct evidence appears as to the addition of the expenses to the vendors' net price, it seems clear from the agreement between the Government and McDowell, the option contract, the statements of McDowell at public meetings, the advice given by the citizens' committee and Colonel Valliant's testimony that it was generally understood that the option price was to be calculated in this way. Although Messrs. Muschany and Andrews were not asked specifically as to how they figured their gross prices stated in the options, both were present at a meeting at which McDowell explained his contract. Since the vendors agreed by the contract to pay all commissions and expenses, they must have added these expenses to what they expected to receive net for their land. Whether the addition was by precise arithmetical computation or by intuitive action is immaterial. The mere fact that no separate statement of the items appears in the evidence in these cases would not overturn the force of this general and definite understanding.

The Court of Appeals was of the opinion that the contracts with the landowners were cost-plus-a-percentage-of-cost and therefore

[6] In the Muschany case, the average valuation of eight Government witnesses, for land upon which the option was taken at $4500, was $1972. The average valuation of seven of respondent's witnesses was $4546. 46 F. Supp. 925.

No finding of value appears for the Andrews case but the evidence shows an average valuation by Government witnesses of $3114 and by the vendor and one of his witnesses of $12,000.

invalid. Any further examination by it of the Government's contention that the contract was contrary to public policy was unnecessary. Petitioners here attack the first conclusion. The Government defends the action of the appellate court on this ground and also because independently of the cost-plus prohibition, the contracts between the landowners and the Government were contrary to public policy.

Prior to consideration of the two principal issues raised by the petitioners and respondent in their arguments before this Court, it seems necessary to refer to the allegations of fraud, unconscionable dealing, bad faith and misrepresentation on which respondent relied in the trial court as invalidating petitioners' contracts. As is indicated, pp. 4-5 *supra*, the trial court specifically found against the respondent on these issues. Nor did the Circuit Court of Appeals reverse the trial court's findings. Fraud, misrepresentation and duress were not argued before this Court. Since the trial court's findings on these issues are supported by substantial evidence, it is not for this Court to undertake an independent examination of these issues as such, or under the guise of determining "just compensation."[7] Only recently this Court restated the rules relating to the weight to be given fact determinations by inferior judicial or quasi-judicial bodies. *United States* v. *Bethlehem Steel Corp.*, 315 U. S. 289, 297-98; *Dobson* v. *Commissioner*, 320 U. S. 489, 321 U. S. 231. Therefore this case comes before this Court without any suggestion of fraud or unfairness such as would justify holding the contracts invalid. Since these matters are not before us, we need express no opinion on this aspect of the case.

[7] Petitioners in No. 31 contracted to sell the government certain land for $4,500, which they had purchased in 1939 for $1,000. The record indicates that since purchasing this land in 1939, various improvements had been made. At the time of purchase there was no highway leading from the main road to the property; a thicket was cleared and a road constructed which passed over an adjoining piece of property. The cultivable area of the land was increased by clearing timber thickets from part of the property. A local drainage district surfaced with rock the river frontage of the property, presumably to stop erosion. There is also evidence indicating that petitioners in No. 31 made a very good buy when they purchased this land for $1,000. It was in the hands of prior owners who had allowed $800 in back taxes to accumulate on the property. As to petitioners in No. 32, they sold land to the government in 1940 at a price of $12,000 for which they paid $2250 in 1934. The lapse of a six year period of time, the change in economic conditions from those of a severe agricultural depression to one of wartime agricultural prosperity furnishes some explanation for the disparity between the price paid for the land in 1934 and the price at which it was valued in 1940.

The federal district court admitted evidence which indicated that McDowell engaged in questionable conduct in securing options from sellers other than the petitioners in the instant case. Such evidence is not relevant to the issue of the validity of petitioners' contracts. The enforceability of petitioners' contracts is not to be determined or colored by McDowell's alleged dealings with other parties; these other contracts are not involved in the instant case and circumstances which might urge a different result with respect to them must be carefully eliminated lest petitioners be penalized for illegal acts of others.

There remains to be considered the question whether mere disparity between the original cost of these lands to the seller and the sale price to the government makes the contracts illegal—whether a contract with the government is invalid on a mere showing that it was highly profitable but not unconscionable. Congress' adoption of statutes providing for the renegotiation of war contracts indicates that in certain instances the government seeks to recover abnormally high contract profits. That Congress could have extended the coverage of these provisions to these contracts is unquestioned; the fact that it did not do so cannot be disregarded by this Court.[8]

It goes without saying that in all dealings with the government contractors and agents alike are under an obligation to deal strictly within the limits of the statutes and with absolute honesty. Criminal sanctions enforce this rule. Similarly, the doctrines of fraud, unconscionable dealing and unjust enrichment are to be strictly applied to insure fair and honest dealing between the government and its citizens. These remedies are available whenever and wherever transgressions take place. However the right to determine the policies or methods by which property is to be acquired rests with Congress.

Applicability of cost-plus-a-percentage-of-cost clause. Prior to the present war emergency the Secretary of War had broad powers to acquire land for military purposes by purchase at prices deemed reasonable by him or by condemnation.[9] There were no

[8] Legislation in regard to the renegotiation of war contracts is not applicable to either of the contracts involved in this case. See Revenue Act of 1942, ch. 619, 56 Stat. 798, Title VIII—Renegotiation of War Contracts—Sec. 801(c)(6); Revenue Act of 1943, ch. 63, P. L. 235, 78th Cong., 2d Sess., Title VII, Sec. 701(b), Sec. 403(c)(6).

[9] Act of July 2, 1917, 40 Stat. 241; Act of April 11, 1918, 40 Stat. 518.

restrictions as to the manner in which he should exercise this power to purchase, but his power to contract for construction work was sharply limited by statute.[10] These restrictions, if continued, would have seriously impeded the War Department's preparation for war. Thereupon Congress passed the act of July 2, 1940, which removed certain of these prior statutory restrictions. The act did, however, restrict the broad powers conferred therein by prohibiting the use of cost-plus-a-percentage-of-cost contracts; use of cost-plus-a-fixed-fee contracts was expressly approved by the act.[11] The question is raised as to whether the prohibition of cost-plus-a-percentage-of-cost contracts applies to the War Department's purchase of these lands with appropriations for the fiscal year 1941.

We are of the opinion that the first section of the act of July 2, 1940, see footnote 11, indicates that the purchase of land by the War Department is subject to the provisions of that section; therefore, the proviso in the section which prohibits use of the cost-plus-a-percentage-of-cost system of contracting must be taken to apply to purchases of land. The act of July 2, 1917, 40 Stat. 241, 518, authorizing the purchase of land, is limited by the quoted section from 54 Stat. 712.

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[10] R. S. § 1136; R. S. § 3734; 10 U. S. C. § 1336; The Walsh-Healey or Prevailing Minimum Wage Act, 49 Stat. 2036.

[11] 54 Stat. 712: "That (a) in order to expedite the building up of the national defense, the Secretary of War is authorized, out of the moneys appropriated for the War Department for national-defense purposes for the fiscal year ending June 30, 1941, with or without advertising, (1) to provide for the necessary construction, rehabilitation, conversion, and installation at military posts, depots, stations, or other localities, of plants, buildings, facilities, utilities, and appurtenances thereto (including Government-owned facilities at privately owned plants and the expansion of such plants, and the acquisition of such land, and the purchase or lease of such structures, as may be necessary), for the development, manufacture, maintenance, and storage of military equipment, munitions, and supplies, and for shelter; . . . *Provided*, That the limitations contained in sections 1136 and 3734 of the Revised Statutes, as amended, and any statutory limitation with respect to the cost of any individual project of construction, shall be suspended until and including June 30, 1942, with respect to any construction authorized by this Act: *Provided further*, That no contract entered into pursuant to the provisions of this section which would otherwise be subject to the provisions of the Act entitled 'An Act to provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes', approved June 30, 1936 (49 Stat. 2036; U. S. C., Supp. V, title 41, secs. 35-45), shall be exempt from the provisions of such Act solely because of being entered into without advertising pursuant to the provisions of this section: *Provided further*, That the cost-plus-a-percentage-of-cost system of contracting shall not be used under this section; but this proviso shall not be construed to prohibit the use of the cost-plus-a-fixed-fee form of contract when such use is deemed necessary by the Secretary of War."

Our next inquiry is as to whether the contract with the vendors, note 4, *supra*, violates this prohibition against cost-plus-a-percentage-of-cost contracts. Evidently the proviso was inserted to avoid the abuses which were prevalent before and during the first World War from the Government's guarantee of cost plus a profit to contractors.[12]

The purpose of Congress was to protect the Government against the sort of exploitation so easily accomplished under cost-plus-a-percentage-of-cost contracts under which the Government contracts and is bound to pay costs, undetermined at the time the contract is made and to be incurred in the future, plus a commission based on a percentage of these future costs. The evil of such contracts is that the profit of the other party to the contract increases in proportion to that other party's costs expended in the performance. The danger guarded against by the Congressional prohibition was the incentive to a government contractor who already had a binding contract with the Government for payment of undetermined future costs to pay liberally for reimbursable items because higher costs meant a higher fee to him, his profit being determined by a percentage of cost. Congress certainly did not intend to prevent a party who was merely submitting a bid to the Government from computing the amount of his bid by taking into consideration his costs and then adding a certain percentage of the cost as his profit, the resulting sum bid being fixed in amount and not subject to change. Congress, by changing the original prohibition in the act from one outlawing any "cost-plus" system of contracting so as to expressly authorize use of a "cost-plus-a-fixed-fee" form of contract, indicated it did not care how the contractor computed his fee or profit so long as the fee or profit was finally and conclusively fixed in amount at the time when the

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[12] 86 Cong. Rec. 7839, 7841, 7843. The proviso as adopted by the Senate read: "That what is known as the cost-plus system of contracting shall not be used under this section." We do not know the precise reason for the change from this language to the present, as it took place in conference. The statement from the managers on the part of the House reads:

"[The conference bill] substitutes for the limitation upon the use of the cost-plus system of contracting a provision which bars the use of the cost-plus-a-percentage-of-cost system but allows the Secretary of War, when he deems it necessary, to use the cost-plus-a-fixed-fee form of contract." H. Rep. No. 2578, 76th Cong., 3d Sess., p. 6.

It might be inferred that the change was made to accord with the clause allowing cost-plus-a-fixed-fee. Whatever the reason for the change the final form is less restrictive on the War Department than the "cost-plus" system which was first forbidden.

Government became bound to pay it by its acceptance of the bid. By eliminating the risk of loss and permitting the guarantee of a satisfactory but fixed fee, Congress sought prompt performance and lower over-all expenditures for contracts in a rising labor and commodity market than would be offered by contractors who were compelled themselves to assume the risk of these unpredictable costs.

The vendors' contract, when read with the McDowell contract, shows that the Government arranged for a fee to its agent based on a percentage of the purchase price. This does not fall within the language of cost-plus-a-percentage-of-cost. The offer was to sell to the Government at a fixed, definite price. The Government when it accepted this offer agreed to pay this set amount and no more. The contract contains no provision allowing adjustment of price based on possible future indeterminate expenses. The vice of cost-plus contracts is not inherent in the vendors' contract. That vice basically is the incentive to the contractor to inflate his future costs to increase his profits since the Government is already bound to pay any future undetermined "costs." The amounts to be paid under petitioners' contracts are not subject to change by future action of the vendor. The Government knew the total cost when it became bound on the contract. If we read the vendors' contract as affected by the McDowell contract, no cost-plus contract emerges. The United States knew its agent's fee to the penny when it accepted the option. It was five per cent of the gross sale price. Notes 3 and 4 *supra*. That is to say, the price to be paid for the land was subject to the approval of the Government. The War Department could accept or reject the offers submitted by McDowell. When the War Department approved each offer, it fixed the precise fee which McDowell was to receive. The arrangement may have been improvident from the point of view of the Government. But that question goes to the quality of management by its procurement officers. The fact that the procurement system is improvident obviously does not make it illegal. Illegality does not emerge from inadequate supervision of prices by the Real Estate Branch. Such official failures are not chargeable to a third party dealing with the Government in good faith. It may be unwise for the Government to pay its purchasing agent a commission which is figured on cost of purchases to the Government but there is no statutory prohibition. Since the United States is the pur-

chaser of the land at the option price, no one can receive cost plus anything. Neither the vendors nor McDowell agrees to buy from a third party and sell to the Government at an advance. The vendors' contract has neither the form nor the vice of a cost-plus contract.[13]

Public policy. The Government advances a further and distinct argument for affirming the judgment of the Circuit Court of Appeals that the vendors' contract is invalid. This is that the contracts of Muschany and Andrews are invalid as against public policy because of the interest of McDowell which is antagonistic to the United States and because of the contingent character of the McDowell fee which, it is asserted, is paid by the vendors for the procurement of the contract of sale. We think that it is inadmissible to view the McDowell contract and the vendors' contracts as unrelated. On account of the vendors' thorough understanding of McDowell's agency, as discussed in the preceding division of this opinion, their contracts must be read as though the McDowell contract was written into them to show his agency for the Government.

When this is done, it is clear that the objection to the vendors' paying a fee contingent on the securing of a Government contract disappears. While in form the McDowell fee and other expenses are paid by the vendors, it was so handled, as is shown by the finding of the trial court, that "the several transactions [might be] closed with the issuance of one, instead of several vouchers, for each tract." 46 F. Supp. at 925-26. The evidence indicates that in reality McDowell was the Government's agent and that his commission, although nominally paid by the vendor, amounted to a payment by the Government to him as its agent. Contingent fee contracts to secure Government business for the employer of the recipient have been held invalid because of their tendency to induce improper solicitation of public officers and the exercise of political pressure. *Steele* v. *Drummond*, 275 U. S. 199, 206.[14] For the most part these cases have involved situations where a would-be contractor has hired a third person on a contingent fee basis to procure for the former a contract with the Government. But neither the language of these cases nor the policy behind them

[13] But see United States v. Two Acres of Land, etc., 144 F. 2d 207.

[14] Cf. Tool Company v. Norris, 2 Wall. 45; Trist v. Child, 21 Wall. 441, 449-52; Hazelton v. Sheckells, 202 U. S. 71, 78, 79; Crocker v. United States, 240 U. S. 74, 78-81.

applies to the situation involved in this case, where the Government, not the would-be contractor, hires an agent for the purpose of soliciting offers from owners of needed land, the agent's compensation to be contingent on submission of offers acceptable to the Government. We have here a contingent fee contract of an entirely different type. It is the Government here who pays the contingent fee and pays it not for securing a contract from the Government but a contract for the Government. The agent acts under the highest legal and moral responsibilities to his principal, the Government. There is no place for financial temptation or political pressure to influence public officials. Tendentious fraud does not exist in such a contingent contract. It may be most desirable to pay agents only in the event that they are successful in accomplishing their purpose. We are dealing here with public policy. Congress may think that it is wise to outlaw contingent contracts such as this but until it does we cannot say that they are contrary to public policy, any more than we could say cost-plus contracts are contrary to public policy in the absence of legislation to that effect.

In reaching the foregoing conclusion on the contingent fee aspect of the problem, we laid aside consideration, from the standpoint of public policy, of the fact that the contingent fee is to be measured by a certain percentage of the purchase price. We now consider that. The record gives no satisfactory explanation for the apparently ingenuous action of the Real Estate Branch of the War Department in paying a commission on the purchase price to its soliciting agent. Certainly the officers realized the possibility of and temptation to price inflation. Necessity for speedy acquisition could not have been their motive in view of the possibilities of a declaration of taking. 46 Stat. 1421. It well may be that experience with condemnation awards and the cost of acquisition by salaried government servants appeared to foreshadow more expense than the plan adopted.[15]

It may have been the Department's conclusion that its officers could regulate the offer of prices above the market by a refusal to accept the options. Colonel Valliant visited the area to gather information during the purchases. Our inquiry at this point,

[15] Testimony of Under Secretary Patterson, April 29, 1941, before the subcommittee of the Committee on Appropriations, House of Representatives, on the Military Establishment Appropriation Bill for 1942, 77th Cong., 1st Sess., p. 106.

since corruption is not shown, is as to whether the likelihood of disadvantage to the Government is so menacing as to prohibit such contracts regardless of the effect in a particular case.

No other case has come to our attention which has declared that a commission or purchase contract is invalid on the ground of public policy. Public policy is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests. *Vidal* v. *Philadelphia*, 2 How. 127, 197-98. As the term "public policy" is vague, there must be found definite indications in the law of the sovereignty to justify the invalidation of a contract as contrary to that policy. *Twin City Co.* v. *Harding Glass Co.*, 283 U. S. 353; *Frost & Co.* v. *Mines Corp.*, 312 U. S. 38. It is a matter of public importance that good faith contracts of the United States should not be lightly invalidated. Only dominant public policy would justify such action. In the absence of a plain indication of that policy through long governmental practice or statutory enactments, or of violations of obvious ethical or moral standards, this Court should not assume to declare contracts of the War Department contrary to public policy.[16] The courts must be content to await legislative action.

The Government calls attention to Criminal Code, sections 41, 112 and 113, and the act of March 3, 1917, 39 Stat. 1106,[17] as indicative of a declared public policy against an agent of the United States being permitted to have a pecuniary interest in a contract when that interest would be enhanced in value at an expense to the United States. But these sections relate to a Government official's representation of the Government in matters involving a private corporation or firm in which the Government agent has an interest, or a Government official's receipt of consideration for procuring a contract from the Government for any person or for any service rendered in relation to any such contract, or receipt of any salary or supplement to salary in connection with his government services from any source other than the Government of the United States. Thus these sections manifest a legislative intention to bar a government agent from receiving pay

[16] Cf. Chicago & Railroad Co. v. Pullman Car Co., 139 U. S. 79, 89; Baltimore & Ohio &c. Railway v. Voigt, 176 U. S. 498, 513-520.

As examples of contracts which have been held invalid as acts or contracts against public policy, see Sprott v. United States, 20 Wall. 459; McMullen v. Hoffman, 174 U. S. 639; Burt v. Union Central Life Insurance Co., 187 U. S. 362.

[17] See also Executive Order 9001, Title I, § 1, Title II, §§ 5, 6, 6 Fed. Reg. 6787; 50 U. S. C. § 611, n., (appendix).

from a third party for assisting that third party to secure a government contract.

Here the pay was for services rendered to the Government. In form the vendors agreed to pay the compensation but actually the United States was the payor. As stated above it was merely a convenient way in which the Government's promise to pay its agent could be met.

It is quite clear that these prohibitions against receipt of compensation from third parties for securing contracts were directed at the crime of bribery in its open or subtle form. We do not see that these statutes manifest a public policy against the use of a commission system for public purchases. The change after experience, from the commission system of land purchases to the solicitation of options by salaried employees of the Government or fixed fee contractors, indicates administrative judgment of desirability, not administrative condemnation of the legality of the method.[18]

Since it is Congressional enactments which determine public policy, any doubt which might exist as to the legality of such an arrangement as was adopted by the War Department for this and a few other projects is dissipated by the action of Congress on the Military Establishment Appropriation bill for 1942. Apparently a limitation of commissions on land purchases was omitted from the bill in accordance with suggestions of the War Department.[19] The commission type of contract was recognized as appropriate in certain circumstances by the Naval Appropriation Act of 1942, 55 Stat. 151, 177.[20] A similar provision appears in the Military Appropriation Act of 1944, Sec. 12, 57 Stat. 347, 369.[21]

We have considered the Government's contention that the two per cent limitation means that not more than two per cent of the

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[18] See the testimony of Under Secretary Patterson, Hearings before the subcommittee of the Committee on Appropriations, House of Representatives, on the Military Establishment Appropriation Bill for 1942, 77th Cong., 1st Sess., p. 106.

[19] Hearings, *supra*, n. 18, p. 106; Hearings before the subcommittee of the Committee on Appropriations, United States Senate, 77th Cong., 1st Sess., on H. R. 4965, pp. 47-48.

[20] 55 Stat. 177: "SEC. 7. No part of any money appropriated herein or included under any contract authority herein granted shall be expended for the payment of any commission on any land purchase contract in excess of 2 per centum of the purchase price."

[21] See also Executive Order No. 9001, Title I, 6 Fed Reg. 6787, 50 U. S. C. § 611, n. (appendix).

estimated price may be paid as a fixed fee.[22] There is nothing that indicates to us that the provision is not intended to apply to the contracts for commission on the purchase price of land. This was the system which the witnesses considered dangerous.

Reversed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

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[22] See Hearings before the subcommittee of the Committee on Appropriations, House of Representatives, 77th Cong., 1st Sess., on the Navy Department Appropriation Bill for 1942, pp. 502-504, 505-509; Hearings before the subcommittee of the Committee on Appropriations, U. S. Senate, 77th Cong., 1st Sess., on the Military Establishment Appropriation Bill for 1942, pp. 46-50, 53.

Mr. Justice BLACK, dissenting.

The Constitution provides that the government shall not take private property for a public purpose without payment of just compensation. The problem here is whether the arrangements now before us give rise to enforcible agreements or whether the rights of the parties are to be governed by the constitutional requirement for "just compensation" for the land needed by the government. More specifically, the question is whether in the situation revealed by this record the law demands that certain property holders shall receive in payment for their properties amounts which, even in the absence of a finding of fraud, may well be far in excess of what is "just compensation", thereby imposing an unjust burden on the public. The Court says "Yes"; I say "No".

The agreements were executed under the following circumstances. A War Department representative agreed that one McDowell should undertake to secure options to buy 18,000 acres of land at Weldon Springs, Missouri, where the government was about to build a war munitions plant. Under the original agreement McDowell was to receive from the government a commission of 5% of the gross sale price of each parcel of land. Later, McDowell, presumably with the acquiescence of the contracting officer, adopted a plan under which the landowners executed options for a price which included the 5% commission. Thus, the less the cost of the lands the less McDowell would make; the greater the cost, the greater his commission.

The ensuing results were, if not inevitable, at least not surprising. With phenomenal speed McDowell obtained 270 separate options and promptly recommended their purchase to the Department at the stipulated prices. On what appears to have been no more than an inescapably formal examination of these recommendations,[1] 129 options were accepted and contracts of purchase were executed at an expense of approximately a million dollars to the government. After an investigation of the whole affair by the Department of Justice the remaining 149 contracts were repudiated by the government, condemnation proceedings were filed, and immediate possession of the land was awarded the government. See 46 Stat. 1421. In the condemnation proceedings the government sought, as to the uncompleted McDowell transactions, to pay no more than just compensation for the properties.

This Court now holds that the government is irrevocably bound by the contracting officer's "acceptance" of the McDowell options. And while the immediate judgment directly affects only the two pieces of property here involved, the principles announced uphold the validity of all the McDowell-procured agreements, even though the agreed cost stipulated in those agreements might in condemnation proceedings be judicially determined to exceed just compensation. The District Court in these two cases did not determine what would be just compensation. It found no more than that the option agreed price of these particular lands was not "unreasonably excessive." The District Court did not find that the agreed prices represent a fair market value; the opinion of the Circuit Court of Appeals makes it clear beyond doubt that it was impossible to make such a finding. The record shows that the government will now be required to pay the petitioners in No. 31, a value, as of 1940, of $4500.00, or $165.00 per acre, for land

[1] At the time of these purchases, the Real Estate Section of the Quartermaster Corps was in charge of land procurement. Because of intensive National Defense activity, this section had under way purchase of lands for one hundred and eight separate projects, involving between twelve and fifteen thousand individual parcels, with an estimated value of about fifty million dollars. The Colonel in charge of the section had at his disposal a staff of three commissioned officers and about forty-one civilian employees. This Army office, in charge of nation-wide land purchases, was therefore compelled to rely chiefly upon McDowell's valuations.

The Muschany transaction is a typical one. November 29, 1940, McDowell sent the option agreement to the Washington purchasing office recommending its "acceptance as a fair value to the United States." Four days later, December 3, without separate appraisal of any kind, the Washington contracting officer marked it "accepted." This was the only contract executed with the landowner by the government, if such an action can be called a contract at all.

which petitioners bought in 1939 for $1000.00, or $33.33 per acre. The other petitioners are to be the beneficiaries of a similar "contract" bounty. For lands and improvements which cost them $2250.00 in 1934, or about $24.00 per acre, the government must pay $12,000.00, or $127.00 per acre.[2]

The details of the negotiations between McDowell and the landowners are set out in the opinion of the Circuit Court of Appeals and need not be repeated at length here. Reference is there made to successive recommendations by McDowell on the same parcel of land for purchase at $4500.00, $10,000.00 and $4900.00. In another instance a landowner refused the request of one of McDowell's representatives to up the price of his property $50.00 per acre. Still other illustrative items included in agreed prices, such as those which the Court today holds invulnerable, are "one year's loss in salary of each partner" and $6500.00 for "loss of business."

Nothing but the clearest and most unequivocal Congressional enactment could in my judgment bind the government to such arrangements. There is no such enactment. And even if Congress had not itself condemned such contracts as these, conceivably, they are within the ban of principles previously enunciated by this Court.[3] For the terms of McDowell's contract, which was an integral part of the purchasing system here involved, were such that the harder he worked to reduce the price of the land he bought, the less he made. He could not possibly serve most profitably his own interest and that of the government at the same time. Only by acting to the financial disadvantage of the government could he act for the financial advantage of himself.

It was to protect the public from the dangerous tendency of the excesses of just such contracts that Congress has repeatedly prohibited[4] the War Department from using "the cost-plus-a-

[2] In referring to the District Court's finding that $12,000.00 was "not an unreasonably excessive valuation of the land in question," the Circuit Court of Appeals made this comment:

"The latter finding is perhaps a bit strained, since the substance of the evidence on behalf of the landowners was simply that the land had a farm value of only $50 an acre (a total of $4,725), but, as the landowners' only value witness put it, 'I think someone from St. Louis that wants a site would put as high as $125 an acre [a total of $11,800] for that ground.'"

[3] Marsh v. Whitmore, 21 Wall. 178; Michoud v. Girod, 4 How. 503; Tool Co. v. Norris, 2 Wall. 45; Hume v. United States, 132 U. S. 406; United States v. Carter, 217 U. S. 286; Crocker v. United States, 240 U. S. 74; see also the opinion of District Judge Collet in 45 F. Supp. 1016.

[4] "As a result of experiences with cost plus a percentage of cost contracts during the first World War and the early part of this war, use of this type of contract is now almost without exception prohibited by statute." C. C. H.

percentage-of-cost system of contracting." Congress had in 1936 received a report from a special Senate Committee investigating the munitions industry pointing out the evils of that contracting system. That report said: "It is generally admitted that exorbitant profits were made under cost plus a percentage of cost contracts in the World War. . . . The profiteering under cost plus a percentage of cost contracts in the last war was so flagrant that Congress has expressly disapproved of their use for Government procurement."[5]

The same Senator who made this report, initiated a Senate discussion which led to the immediate adoption of the prohibition of "cost-plus-a-percentage-of-cost" contracting in the Act here involved. He excoriated the cost-plus-a-percentage system as a "vicious" one.[6] It was this "system of contracting" which Congress forbade, a system which from its very nature keeps constantly dangling before the eyes of the government's contractual agent hope of a progressingly increasing reward for himself for every added dollar of cost he can get the government to pay. This system of contracting was not deemed "vicious" for lack of "certainty" as to costs, but because of the "certainty" of its inexorable tendency to elevate those costs to heights which would impose unfair burdens on the public treasury.

War Law Service, Government Contracts, Par. 1015. See Act of June 28, 1940, sec. 2(a), 54 Stat. 676, 677; Act of May 2, 1941, sec. 2(c), 55 Stat. 148; Act of December 18, 1941, Title II, sec. 201, 55 Stat. 839. See also, Act of June 30, 1941, sec. 9, 55 Stat. 393, and Act of June 5, 1942, sec. 13, 56 Stat. 317. The regulations issued by the President under the First War Powers Act of 1941, applicable to the War Department, the Navy Department, and the United States Maritime Commission, likewise expressly prohibit cost plus a percentage-of-cost contracting. Executive Order No. 9001, December 27, 1941, as amended, Title II, sec. 6.

[5] Senate Report No. 944, 74th Cong., 2d Sess., Special Committee Investigating the Munitions Industry, Part 4, at page 22.

[6] "So there is nothing to hinder the present Secretary of War, or any other Secretary of War, if he desires to do so, from going back to the old, vicious cost plus system which we had during the World War, when, in one instance which fell under my observation—not in the War Department, but in the Navy Department—in the construction of naval vessels on a cost plus 10 percent basis, in making up the cost base on which the people of the United States were required not only to pay cost but to pay 10 percent additional, one great shipbuilding company in this country added in the cost of wines, liquors, and cigars used on the trial trip, and the cost of the prize given to the lady who christened the ship. They even added in the cost of representatives maintained by the company in China and in Japan for the purpose of promoting other business of the company on the theory that if they secured any outside business it would reduce the overhead chargeable to the Government." Cong. Record, Vol. 86, Part 7, p. 7839, 76th Cong., 3rd Sess. Another Senator, in the same discussion, said with reference to this system of contracting, "A man will say, 'I have a return of 10 percent of the contract price, and I will get what I can under it, pile up expenses, and so forth.'" Cong. Record, Vol. 86, Part 7, p. 7841, 76th Cong., 3rd Sess.

That this was the moving purpose in prohibiting such a contract system is further shown by the fact that Congress at the same time permitted a "cost-plus-a-fixed-fee form of contract." Certainly Congress could not thereby have intended to reduce the scope of its sweeping condemnation of "cost-plus-a-percentage-of-cost system." On the contrary, permission to use the fixed fee contract but underlines the Congressional intent absolutely to prohibit any War Department agent from using a system of contracting which would impose upon the government inflated costs by providing an incentive to pad costs or to take too rosy a view of value. Whatever other disadvantages the cost-plus-a-fixed-fee system may have, no incentive to raise the cost arises from the fixed fee. But when a percentage fee or compensation is provided for, which diminishes or increases in proportion to costs, there is ample motive or at least tendency to increase such costs.[7]

That incentive looms large in the contracts here involved.[8] It matters not into what form the arrangement is cast. It is conceded that had this contract required McDowell himself to buy and take title to the lands, the arrangement with him would have been within the Congressional prohibition as a "cost-plus-a-percentage-of-cost" contract. But the fact that he did not take title himself did not lessen the tendency of the contractual arrangement to invite him to increase his reward by inducing the government to pay a high price for the land. The difference created by this slight deviation in the structure of the arrangements did not alter their effect. The "vicious" tendency at which Congress hit was still present. The government was still obligated to pay the landowner's price—the land's cost plus a percentage to Mc-

[7] "There are two general classes of 'cost plus' contracts. One class is generally known as 'cost-plus-a-percentage' contracts and the other as 'cost-plus a fixed-fee' contracts. They are materially different. Under those in the first class the fee or profit of the contractor is made dependent on the cost of the work with the idea that the amount of the fee will automatically adjust itself to the variations in the cost of the work resulting from changing conditions and requirements during the life of the job. It is self evident that under this class of contract it is to the financial interest of the contractor to have the cost of work run high. Under the second class, the fee is not affected by variations in costs, but only by changes in the scope of the work. From this it follows that it is to the advantage of the contractor to accomplish the work at as low costs as possible." The Law of Government Contracts, Graske (1941) pp. 122-3.

[8] The Circuit Court of Appeals in discussing the general tendency of this system of contracting to increase costs to the government said: "The probability of that general result in the Weldon Springs transactions is, as we have indicated, quite cogently suggested (and indeed demonstrated) by the record."

Dowell of that cost. Furthermore, the effect, if any, of McDowell's not taking title himself, was to aggravate the government's peril, for McDowell did not take any risks of purchase. To hold that these arrangements are legal is to leave unchecked a system of government purchasing which Congress has declared to be incompatible with the public interest.

It is said that statutes providing for the renegotiation of war contracts indicate that in "certain instances the government seeks to recover abnormally high contract profits." These efforts of Congress to safeguard the public interest against unjust exactions provide no excuse for the narrow construction the Court today gives the "cost-plus-a-percentage-of-cost" prohibition. They but emphasize the intention of Congress to devise many safeguards against unfair procurement prices which might unjustly enrich some few people at the expense of the many. I should think that if these statutes could be given any effect, under the circumstances of these cases, they would but provide an added reason why the government should not be required to pay these landowners more than "just compensation." Certainly, in the light of the legislative policy articulated in the renegotiation statutes, I can see no reason why this Court should work overtime to shrink the scope of the cost-plus-a-percentage-of-cost statutory prohibition.

The Court's judgment in effect upholds McDowell's percentage agreement with the government and the option agreements with the landowners made pursuant thereto. It requires full payment not only of the stipulated land prices but of McDowell's commissions as well. This is so because the $4,500.00 and $12,000.00 included the cost of the land plus the percentage of that cost which was McDowell's commission. Thus, affirmance of the District Court judgments necessarily must imply that McDowell's commission agreements with the government are valid.

The landowners' rights are indissolubly intertwined with McDowell's.[9] Both must stand or fall together on the validity of McDowell's and the landowners' arrangements with the government. And under those arrangements the government was to pay

[9] The difficulty of an attempt to segregate McDowell's commissions from the land costs is indicated by the manner in which the Circuit Court of Appeals found he computed his commissions. It said that the option agreements included "commissions upon his own commissions, commissions upon the commissions of the Kansas City Title Insurance Company for closing the transactions, and commissions upon the amounts included in the contracts for revenue stamps and recording fees." What particular elements McDowell had fused into the real estate values recommended by him in any specific transaction were apparently not known to the Quartermaster Depart-

cost of the lands for which McDowell negotiated plus five percent of that cost. This was a "cost-plus-a-percentage of costs system of contracting." Such an integrated scheme of illegal arrangements should not be permitted to support these judgments. The government should be required to pay no more than just compensation for the lands it has condemned.[10]

Finally, I cannot agree to the Court's statement that this case comes to us "without any suggestion of fraud or unfairness such as would justify holding the contract invalid." The Court's opinion states that those who deal with the government must do so "with absolute honesty," and that "the doctrines of fraud, unconscionable dealing and unjust enrichment are to be strictly applied to insure fair and honest dealings between the government and its citizens." In my judgment, we are squarely confronted with the issues of fraud, unconscionable dealing, and unjust enrichment. I think we should remand the case to the Circuit Court so that it can pass upon those questions.

We are not faced here with a situation in which findings, upon "ample evidence", have been clearly made by a master and unequivocally and jointly affirmed by both a District Court and Circuit Court of Appeals—as in *United States* v. *Bethlehem Steel*

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ment at the time the contracts were approved." The Muschany's option agreement, in Case No. 31, which the government contracting officer marked "accepted"; did not show the amount of McDowell's commission; it showed only that the purchase price was $4500.00. There is neither finding nor evidence from which it can be determined what part of this purchase price, if any, represents McDowell's commission. In fact, petitioners strangely enough contend that there is no evidence to show that McDowell is to get any part of the $4500.00 as a commission. The same situation exists in No. 32.

[10] Were this contract not invalid as violating the Congressional prohibition against the cost plus a percentage of cost system, there would still remain the question as to whether the government was compelled to pay more than "just compensation" in these condemnation proceedings. We have never decided that there may not be circumstances short of those necessary to hold private contracts illegal, under which the government may, in condemnation proceedings, obtain judicial ascertainment of just compensation, despite a single contracting officer's agreement to pay more, and despite his attempted waiver of the Constitutional provision that the government need only pay "just compensation" for land it takes for public use. Danforth v. United States, 308 U. S. 271 actually decided quite different questions under a different statute, different pleadings and quite different circumstances. In condemnation proceedings, Danforth filed a counter claim seeking judgment against the government for a price stipulated in an agreement. The government attacked the counter claim and it was stricken in District Court on two grounds only: (1) the government had not consented to the suit; (2) the District Court was without jurisdiction because more than $10,000 was involved.

Co., 315 U. S. 289, 297-9.[11] The District Court and the Circuit Court of Appeals did not in the instant case, both concurrently find an absence of fraud, unconscionableness and unjust enrichment.

The District Court did state in its opinion that there was "no fraud", and that the option prices were "not unconscionable." This finding of the absence of fraud was, however, unsupported by the primary findings of fact made by it, and that court's conclusion rested upon legal assumptions which I think contrary to many decisions of this Court. The same is true of the finding of unconscionability. As to "unjust enrichment", the District Court made no finding at all, and I believe that its primary findings of fact are inconsistent with any holding that these landholders would not be "unjustly enriched" if the government is forced to pay the option prices.

The Circuit Court of Appeals found it unnecessary to pass upon either of these questions. It refused to indulge in what it termed a "judicial paring" of the cost-plus-a-percentage-of-cost statutory prohibition, and held the contracts void under that statute.

The District Court considered that the government's argument required it affirmatively to find the following three facts in order to hold that there was fraud: "(1) The agent's commission was added to the purchase price, (2) the price did not represent the reasonable market value of the land, and (3) McDowell misrepresented the value of the land to Col. Valliant."

As to the latter point, the District Court, in its opinion, stated that there was no misrepresentation by McDowell. The Circuit Court of Appeals did not affirm this finding. It did say that the record and findings of the trial court left no question "as to the actual good faith of the Quartermaster Department in the matter." But after narrating certain activities of McDowell, it observed that "These inconsistencies and disguising can hardly be commended as desirable methods of handling expenditures of public funds. The excuse made by the Quartermaster Department on the trial was its desire to get the job done as speedily as possible and 'because in one single voucher we could provide for the payment of a number of different services.' The result reached in the opinion requires no further pursuit here of these particular matters."

[11] Even if the Circuit Court of Appeals and the District Court had not passed upon these questions,—and I do not think they did—it does not necessarily follow that we would not review them. See City Bank Farmers Trust Company v. McGowan, No. 294, decided January 29, 1945, p. 5 of slip opinion; cf. City Bank Farmers Trust Company v. McGowan, 142 F. 2d 760, 801, and 48 F. Supp. 790, 795-6.

The Circuit Court's opinion, taken in its entirety, shows beyond doubt that it did not approve the District Court's findings as to McDowell's dealings.

The District Court further based its conclusion that there was no fraud, on a finding that the agent's commission was not added to the purchase price. This finding, the Circuit Court of Appeals expressly rejected. This Court has done likewise.

The third and last element which the District Court had posed concerning the presence of fraud was whether "the price did not represent the reasonable market value of the land." Neither the District Court nor the Circuit Court of Appeals found that the price did represent such a value. If such a holding has been made at all, it is by this Court, and I cannot agree to it. The District Court escaped the necessity of making a finding as to market value by holding that market value was immaterial, since "The circumstances of this case show that other considerations were in the minds of the parties when the option was taken. The necessity of national defense had flashed upon the country. The imminence of the peril was impressive. The land must be acquired at once, without the delay incident to condemnation. . . . The land was sought, but more was demanded; immediate possession was essential to its undertaking."

I can accept neither the court's conclusion, nor its reasoning. In the first place, this Court has long held "market value" to be the proper standard of value in eminent domain proceedings, and in considering market value, it has consistently been held that landowners are not entitled to increased amounts because the government announces that it needs property in a vicinity. *United States* v. *Miller*, 317 U. S. 369, 374, 376-377. Secondly, it is novel doctrine that when national peril requires the government to acquire property, the owners are as a matter of law entitled to get more than market value because more is "demanded." Furthermore, the court's assumption that the government was without power to get immediate possession of the land by condemnation proceedings was wholly erroneous. Declaration of Taking Act, 46 Stat. 1421.

Having thus put aside consideration of the fair or market value of the property the court limited itself to finding that the option prices did not represent an "unreasonably excessive value." What line marks the distinction between reasonable excess and unreasonable excess does not appear from the District Court's opinion nor from this Court's opinion today. An examination of the particular

facts in No. 31 suggests the difficulty of ever ascertaining what would be an unreasonably excessive value. In 1939, $800 back taxes had accumulated on 33 acres of land. The Muschanys bought it, paying the $800 taxes, $100 to the owners, and approximately $100 was allegedly expended for attorney's fee, abstract of title, etc. In 1940, the "necessity of national defense had flashed upon the country." The finding of the District Court, which was not approved by the Circuit Court of Appeals, is apparently approved by this Court today to the effect that 350% profit on this purchase of land is not "unreasonably excessive", even though the purchaser has held it for only one year. The only subsidiary finding of fact which the District Court made to support this phenomenal rise in value was that in 1937, a road had been built which shortened the distance to St. Louis by about 15 miles. But this road had been built two years before the Muschanys paid off the back taxes and took the property into their possession. The Court today, however, refers to certain other events which had occurred, and which are evidently relied upon as justifying this increase in value from $1,000 to $4,500 in the short span of a single year. It is clear that there was one reason, and one reason only, for the $4,500 price. That reason was that the government needed the land to help win the war and McDowell had a cost-plus-a-percentage-of-cost contract.

The Circuit Court of Appeals in discussing this question of value said, "There is, however, no occasion for us here to review either the government's or the landowner's evidence as to value in the two cases. If the value of the land were the issue to be determined, we might hesitate to reject the trial court's findings in either case, under Rule 52(a), Federal Rules of Civil Procedure, 28 U. S. C. A. following Par. 723c. But the findings referred to are not determinative of the issue here being considered." The Circuit Court of Appeals then went to to decide the only question that it did decide, which was whether McDowell's contract with the government violated the cost-plus-a-percentage-of-cost statute.

At the very least, I think the government is entitled to have the Circuit Court of Appeals pass on the questions of fraud, unconscionability, and unjust enrichment which this Court says "are available whenever and wherever transgressions take place."

Mr. Justice FRANKFURTER and Mr. Justice RUTLEDGE join in this dissent.